



THE CITY OF NEW YORK
LAW DEPARTMENT

100 CHURCH STREET
NEW YORK, NY 10007

ZACHARY W. CARTER
Corporation Counsel

PETER J. FOGARTY
Assistant Corporation Counsel
Phone: (212) 356-3514
Fax: (212) 356-3558
pfogarty@law.nyc.gov

December 18, 2014

VIA ECF

Honorable Vera M. Scanlon
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Natasha Smith, et al. v. City of New York, et al.,
14-CV-5841 (MKB) (VMS)

Your Honor:

I am an Assistant Corporation Counsel in the office of Zachary W. Carter, Corporation Counsel of the City of New York, representing defendants in the above-referenced action. Defendants write respectfully to pre-empt a potential issue with plaintiff Khymali Lysius's acceptance of defendants' Rule 68 Offer of Judgment.¹

By way of background, plaintiffs allege, *inter alia*, that, on November 13, 2013, members of the New York City Police Department unlawfully entered and searched their apartment and falsely arrested plaintiffs. On December 12, 2014, defendants served plaintiffs with Rule 68 Offers of Judgment. The Rule 68 Offers of Judgment made clear that they may only be accepted if all three plaintiffs accept the Rule 68 offers made to them. (Docket Entry No. 16) On December 18, 2014, plaintiffs' counsel accepted the Rule 68 offer as to Khymali Lysius.² Id.

¹ The undersigned spoke to Janet Hamilton, from the Judgments' Division of the Clerk of the Court of the Eastern District of New York, on December 18, 2014, who represented that a judgment would not be entered in this case, unless plaintiffs Natasha Smith and Jeff Lysius accepted their Rule 68 Offers of Judgment pursuant to the language of the offers of judgment.

² Plaintiffs Natasha Smith and Jeff Lysius have until December 26, 2014, to accept their Rule 68 Offers of Judgment. Plaintiffs' counsel, however, represented to the undersigned that, as of the

The language of the Rule 68 Offer of Judgment accepted by plaintiff Khymali Lysius clearly states:

“This offer of judgment may only be accepted if plaintiffs Natasha Smith and Jeff Lysius also accept the Rule 68 Offer of Judgment offered to them on December 12, 2014 in full satisfaction of all federal and state law claims or rights that plaintiffs Natasha Smith and Jeff Lysius may have to damages, or any other form of relief, arising out of the alleged acts or omissions of defendants or any official, employee, or agent, either past or present, of the City of New York, or any agency thereof, in connection with the facts and circumstances that are subject of this action.” (Docket Entry No. 16, pp. 2-3)

The text of Rule 68 allows defendants to make an offer on “specified terms.” See Fed. R. Civ. P. 68; see also Stanczyk v. City of New York, 752 F.3d 273, 283-284 (2d Cir. 2014) (noting that “the Rule provides the defending party with discretion to” specify the terms of the contract). Both the Seventh and Ninth Circuit have held that a Rule 68 Offer of Judgment conditioned on the acceptance of all parties is valid and promotes the objectives of Rule 68. See Amati v. City of Woodstock, 176 F.3d 952, 958 (7th Cir. 1999) (“We cannot find anything in the rule, or the case law, to support the view that the condition which the defendants imposed--all the plaintiffs must accept the offer of judgment for it to be effective--is invalid, or if it is that the offer is therefore enforceable.”); Lang v. Gates, 36 F.3d 73, 75 (9th Cir. 1994) (“We see no reason why a defense offer conditioned upon joint acceptance by both plaintiffs should not qualify for Rule 68 treatment.”).

Defendants respectfully submit that the Rule 68 Offers of Judgment are valid and enforceable. Accordingly, plaintiff Khymlai Lysius may only accept the Rule 68 Offer of Judgment if both Natasha Smith and Jeff Lysius accept their Rule 68 Offers of Judgment by December 26, 2014.

Thank you for your consideration herein.

Respectfully submitted,

_____/s/
Peter J. Fogarty
Assistant Corporation Counsel

date hereof, he has not been authorized to accept the Rule 68 Offers of Judgment on behalf of Natasha Smith and Jeff Lysius.

cc: **VIA ECF**
Michael B. Lumer, Esq.
Lumer & Neville
Attorney for Plaintiffs
225 Broadway, Suite 2700
New York, New York 10007